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No. 84-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

PATRICIA CONTI and RICHARD CONTI,
husband and wife,

Petitioners

v.

FORD MOTOR COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Have Petitioners been denied their Seventh Amendment right to a jury trial by the Third Circuit's departure from the established principles of appellate review of jury verdicts.

2. Have Petitioners been denied their seventh amendment right to a jury trial by the Third Circuit's failure to fulfill its obligation under Rule 50(d) to consider whether the entry of judgment notwithstanding the verdict on the warning issue necessitated the granting of a new trial on the defective design issue.

LIST OF PARTIES

The caption of this Petition does not include Richard Conti as a third-party defendant.

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Patricia Conti and Richard Conti respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit entered on September 17, 1984.

I.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit (App. A-1) is reported at 743 F.2d 195 (1984). The Court of Appeals' order denying Petitioner's Petition for Rehearing before the Court En Banc (App.

A-7) is unreported, but the denial is noted in the reported opinion. The memorandum of the District Court denying Respondent Ford Motor Company's post trial motions (App. A-8) is reported at 578 F. Supp. 1429 (E.D. Pa. 1983).

II.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on September 17, 1984. (App. A-1.) Petitioners timely filed a Petition for Rehearing En Banc, was denied on October 12, 1984. (App. A-7). This petition for certiorari was filed within ninety (90) days of the Order of the Court of Appeals denying Petitioners' Petition for Rehearing En Banc. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment of the Constitution of the United States provides:

> In suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

III.

STATEMENT OF THE CASE

A. Proceedings Below.

Petitioners filed this action on May 26, 1981 in the United States District Court for the Eastern District of Pennsylvania against Ford Motor Company. Ford Motor

Company joined Petitioner Richard Conti as a third-party defendant. The District Court's jurisdiction was based on diversity of citizenship, 28 U.S.C. Section 1332.[1]

The Complaint alleged a defective design of the 1980 Ford Mustang as well as the inadequacy of a warning provided to the purchasers, the Contis. Ford Motor Company's third-party action alleged negligence on the part of Richard Conti.

A jury trial was conducted from January 4, 1983 through January 7, 1983. The jury announced its answers to special interrogatories on January 7, 1983. The jury found the 1980 Ford Mustang was not defectively designed, but that Ford Motor Company had given inadequate warning. Damages were awarded to Patricia Conti in the amount of $650,000., and to Richard Conti in the amount of $15,000. The jury found Richard Conti's negligence contributed to the accident by 75%. The trial judge directed entry of judgment in the amount of the verdicts.

Ford Motor Company filed timely motions for a judgment notwithstanding the verdict and for a new trial. The trial judge denied those motions by written opinion on September 23, 1983. (App. A-8)

Ford Motor Company took an appeal on all issues to the United States Court of Appeals for the Third Circuit. On September 17, 1984, the Third Circuit filed its opinion (App. A-1) reversing the trial court and remanding for entry of judgment notwithstanding the verdict in favor of Ford Motor Company. A timely Petition for Rehearing En Banc filed by the Petitioners was denied without opinion on October 12, 1984.

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1. Petitioners were citizens of Pennsylvania when the case was filed and Ford Motor Company is not a citizen of Pennsylvania and its principal place of business is not in Pennsylvania.

B. Facts

In February of 1980, the Petitioners purchased a 1980 Ford Mustang. On November 11, 1980, Patricia Conti was injured as she was entering the car. The car was equipped with a manual transmission. The car was parked in reverse gear, as directed in the Operator's Manual. Richard Conti was in the driver's seat. As Patricia Conti entered the car on the passenger side, Richard Conti turned on the ignition without depressing the clutch. The car started in reverse gear and bolted backward. The opened passenger door struck Patricia Conti and knocked her to the ground.

Richard Conti normally drove a car with an automatic transmission. Cars equipped with automatic transmissions will not start if the transmission selector lever is in forward or reverse. Prior to using a car with an automatic transmission, Richard Conti used a General Motors truck which had a manual transmission. General Motors' manual transmissions have a switch which prevents the vehicle from starting unless the manual transmission is in neutral or the clutch is depressed.

Although Richard Conti did not remember whether he had read the Mustang Operator's Manual, which instructed the driver as follows:

> "On manual transmission vehicles, depress the clutch pedal and place the gearshift lever in the NEUTRAL position, as starter will operate while selector is in any gear." (App. A-25)

he testified that he knew that "if you didn't depress the clutch it wouldn't start," i.e., he believed that if the clutch was not depressed, the car would not start.

The Operator's Manual includes 81 statements which are captioned as "Warning" or "Caution". See examples, App. A-26–A-35. These 81 items are also blocked

out from the rest of the text. The starting instruction previously quoted was not captioned as a warning or caution and was in no other way given emphasis.

Approximately 90% of cars in use in America are equipped with automatic transmissions. General Motors accounts for approximately 2.2% of the manual transmission sales. These cars have safety switches which prevent the starting of vehicles with manual transmissions except when the manual transmission is in neutral or the clutch is depressed. The balance of manual transmissions, including the 1980 Ford Mustang nanual transmission, do not have a safety switch. In these circumstances the public has developed a false sense of security about the risks involved in starting a manual transmission car.[2]

On these facts the jury responded to a special liability interrogatory that

> "Defendant, Ford Motor Company, is liable to plaintiff, Patricia Conti, *because of* inadequate warnings." (emphasis added).

On their own initiative, the jury admonished:

"We, the members of the jury, sincerely recommend Ford Motor Company should install inside the cab of their cars warnings and/or cautions stressing the possible dangers of not following the operator's instructions exactly. Also, it should put more warnings and/or cautions *in operator's manual.*" (emphasis added).

C. The Third Circuit Decision

The general proposition of Pennsylvania law stated by the Third Circuit was correct.

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2. Testimony of Robert Swint found at p. 62 of the Appendix in the Court of Appeals. Later references to that Appendix will be cited as C.A. App. A-19.

> "Where the theory of liability is failure to warn adequately, the evidence must be such as to support a reasonable inference, rather than a guess, that the existence of an adequate warning may have prevented the accident before the issue of causation may be submitted to the jury." (App. A-4)

In denying the motion for a judgment notwithstanding the verdict the trial court applied the same rule of law.

The Third Circuit found the evidence insufficient to present a jury question as to whether or not "additional warnings or reminders may have made a difference". (App. A-6) The court prefaced its analysis of the record with the telling observation: "As *we* read the record, there are no facts in dispute." (emphasis added; App. A-4)

The Third Circuit misread the record. For example, the court stated that Richard Conti drove standard transmission cars "on and off since 1955". The record establishes that prior to driving the 1980 Ford Mustang, he had driven either an automatic transmission car or a General Motors manual transmission with a neutral safety switch. He also testified that in 1955 he drove a standard transmission car which would not start unless the clutch was depressed. The court, on three occasions, stated Patricia Conti "lost her balance and fell", when the testimony was she was struck by the car and knocked down. These errors may not be dismissed as minor because only one other aspect of the record was considered by the court. Richard Conti testified he did not know why he failed to depress the clutch. The court then made its own interpretation of his testimony and concluded "Mr. Conti was no paying attention to what he was doing". All other relevant evidence was ignored by the court as was the trial court's comprehensive analysis of the causation issue.

From this selective and obvious misreading of the evidence the court concluded:

> [T]he jury's conclusion was based on mere speculation that if Mr. Conti's eyes had caught a sticker

> warning him to depress the clutch pedal as he was talking to his wife, he may have remembered to either shift the car to neutral or to disengage the clutch prior to starting the car. (App. A-6)

Contrary to the Third Circuit's analysis, Petitioners' primary theory was that the *Operator's Manual* did not contain adequate warning. The Court's error is exaccerbated by the Court's selective reference to the record. Petitioners as verdict winners were entitled to have the entire record considered, not part.[3]

The Third Circuit ignored the following aspects of the record:

> (i) uncontradicted testimony that the operator's manual instructed the operator to park the car in reverse gear. (C.A. App. 22, 32).
>
> (ii) uncontradicted testimony of the operator that he thought that if he "didn't depress the clutch it (the car) wouldn't start". (C.A. App. 46).
>
> (iii) uncontradicted testimony of the operator that he was "under the impression just before the accident that all standard transmission vehicles had to have their clutches depressed before the engine would turn over and start". (C.A. App. 49)
>
> (iv) uncontradicted *expert testimony* that the Ford Motor Company should have alerted the consumer by making "a clear and obvious indication this is a dangerous condition." (C.A. App. 72)
>
> (v) uncontradicted *expert testimony* that the indication should have been placed "clearly in the manual itself. . ." (C.A. App. 72)
>
> (vi) uncontradicted *expert testimony* that Ford Motor Company should have introduced "this feature to the operator who is. . . . .to study and read

3. See *Moores Federal Practice*, Vol 5A, Par. 50.02[1].

with other warnings and cautions. This should be in the same category. There are dangers associated with this. There are some incipient problems associated with it, recognized by the industry and. . . . .just like other safety features should be alerted to the operator." (C.A. App. 72)

(vii) uncontradicted *expert testimony* that having reviewed the manual in question the expert found that it was lacking such a warning and that, in fact, there was "no warning whatsoever regarding the safety aspects." (C.A. App. 73)

(viii) uncontradicted *expert testimony* that, as an alternative to placing the warning in the manual, the warning could be given to the operator in another form, to wit: "you could placard this, you could give him indications of various safety information as the car is delivered new to him. For example, there could be an attachment to the gear shift mechanism that he would have to remove that would indicate to him warning regarding the aspects of this device and how it should be used and allow him to be acknowledging that. . .and maintain his awareness of it." (C.A. App. 73)

REASONS FOR GRANTING THE WRIT

1. SUPERVISION OF THE COURT OF APPEALS' APPLICATION OF THIS COURT'S DECISIONS ESTABLISHING THE SCOPE OF APPELLATE REVIEW OF JURY VERDICTS IS NEEDED TO INSURE THAT THE SEVENTH AMENDMENT TO A JURY TRIAL IS PRESERVED.

Counsel for Petitioners recognizes that this Court "is not, and never has been, primarily concerned with the correction of errors in lower court decisions".[4] On the

4. Address by Mr. Chief Justice Vinson Before the American Bar Association, September 7, 1949, 69 Sup. Ct. V, VI (1949).

other hand, the Seventh Amendment's guarantee of a jury trial is all but hollow unless this Court on occasion corrects appellate courts which substantially intrude on the jury's function. This case may appear to be an "ordinary" case which is hardly "cert-worthy." It is the "ordinary" character of this case which makes it appropriate for review by this Court. The case is ordinary in the sense that it is a diversity personal injury-products liability action. This "ordinary" case however, presents an unfortunate and reoccurring propensity of the Third Circuit to manipulate the law-fact distinction in an effort to justify the substitution of the Court's interpretation of the evidence for that of the proper factfinder.[5]

The jury was properly charged on the warning issue and no objection was taken. The jury answered the special interrogatory holding Ford Motor Company "liable to the plaintiff, Patricia Conti, *because of* inadequate warnings." (emphasis added) The jury accepted the testimony of Richard Conti and was persuaded by the evidence that consumers as a class are not aware of the risks inherent in the Ford manual transmission and that the risks are not obvious. Yet, the Court of Appeals relied on its own reading of part of the record. The Third Circuit's Opinion offends the basic tenets of appellate review.[6]

The causation issue is whether the absence of an adequate warning contributed to the event which caused the injuries, an issue well within the province of the jury. The jury's answer in the affirmative and its unsolicited admonission that additional warnings be given, demon-

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5. Last term in *Patton v. Yount*, ____ U.S. ____, 104 S.Ct. 2885 (1984) this Court reversed the Third Circuit for mischaracterizing a finding made by a state and federal district court as one of law. There the issue involved the presumption accorded the factfinder under the habeas corpus statute. Here, the seventh amendment is at stake.

6. See e.g. *Brady v. Southern Railroad*, 320 U.S. 476 (1943); Wright & Miller, *Federal Practice and Procedure*, Vol. 9, Sec. 2524-2528 (West 1971).

strates unequivocally that the jury determined that the absence of an adequate warning contributed to the accident. At issue was a question of human behavior no different than that of motive, intent and countless other findings juries have traditionally made. Why is a three judge appellate panel better able to assess this fact?

Petitioners do not quarrel with the proposition set forth in *Greiner v. Volkswagenwerk,* 429 F.Supp. 495, 497 (E.D. Pa. 1977), that if the "remoteness of the casual connection . . . clearly appears" the plaintiff proximate cause claim is defeated. Nor do Petitioners quarrel with *Sherk v. Daisy Heddon,* 498 Pa. 594, 450 A.2d 625 (1982), which holds that misuse of a product precludes a finding of proximate cause. Neither case, so strongly relied by the Third Circuit, applies to the facts of this record. Misuse was not an issue in this case. Moreover, any suggestion of remoteness of the causal connection in this case must be rejected when juxtaposed to the record, the jury's finding and Judge Fullam's opinion on the Ford's post trial motions which concluded:

> "The evidence was also clearly sufficient to support the jury's finding that the absence of adequate warnings was a proximate cause of the accident." (App. A-11)

The cumulative effect of the Court of Appeals' error constitutes a denial of the Petitioners' Seventh Amendment right to a jury trial. The Court of Appeals ignored parts of the record, evaluated on its own other parts of the record, and misinterpreted the factual and legal theories presented to the jury. Its decision is not supported by any Pennsylvania case law and departs egregiously from this Court's long established doctrine limiting the appellate court's function in jury cases.

This case is appropriate for review by this Court because the Seventh Amendment is of little meaning if the

Courts of Appeals are free to insulate their review of a jury verdict by the simple expedient of stating the issue is a question of law.

2. THE PROPER APPLICATION OF RULE 50(d) BY THE COURT OF APPEALS INVOLVES SEVENTH AMENDMENT CONSIDERATION AND ONLY THIS COURT CAN INSURE THE INTEGRITY OF THE APPELLATE PROCESS.

Rule 50(d) authorizes the Court of Appeals when it reverses the judgment of a jury to direct a new trial or order the district court to determine if a new trial should be granted. As this Court stated in *Neely v. Martin K. Eby Const. Co.*, 386 U.S. 317 (1967):

> "It was, of course, incumbent on the Court of Appeals to consider the new trial question in light of its own experience with the case." 386 at 329-30.

The power conferred by Rule 50(d) is an important instrument of justice and a safeguard of a litigant's right to a jury trial. In this case the failure to employ that safeguard denied Petitioners their right to a jury trial.

Suppose a jury was charged on two counts of liability. Thereafter, it decided one in favor of a plaintiff but could not reach a verdict on the second. If the trial or appellate court granted a judgment notwithstanding the verdict, the plaintiff would then be entitled to a new trial on the unresolved.

The basic cause of action against Ford Motor Company was that the 1980 Ford Mustang with a manual transmission was an unreasonably dangerous product under Section 402A of the Restatement of Torts. Two theories were pleaded and tried: (1) was the car defectively designed because there was no neutral safety switch and, (2) if it was not defectively designed were the warnings inadequate in light of the risk. The two theories were interindependent.

Now the Court of Appeals has ruled that no charge should have been given on the warning issue. The Third Circuit has thereby foreclosed the Petitioners from trying their case on the single liability theory of whether the car was defectively designed because there was no neutral safety switch. The remedy for this denial of a jury trial was the granting of a new trial by the Third Circuit.

In *Neely* the Court of Appeals had not addressed the new trial issue in its Opinion, but this Court concluded;

> "[W]e will not assume the Court ignored its duty. . . .although it would have been better had its opinion expressly dealt with the new trial question." 386, U.S. at 330.

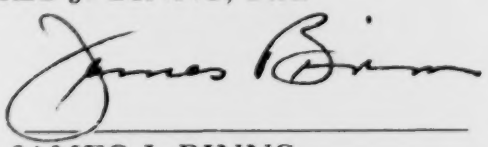
It is apparent from the Third Circuit's Opinion that no consideration could have been given to the Petitioners' entitlement to a new trial. Moreover, in this case the ground for a new trial arose only after the Third Circuit directed entry of the judgment notwithstanding the verdict.

CONCLUSION

For the reasons stated, the Court should grant Richard and Patricia Conti's Petition for a Writ of Certiorari and review the decision of the Third Circuit Court of Appeals.

Respectfully submitted,

JAMES J. BINNS, P.A.

By: 

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APPENDIX

CONTI, Patricia and Conti, Richard, husband and wife

v.

FORD MOTOR COMPANY and Winner Ford, J/S/A

v.

Richard CONTI.

Appeal of FORD MOTOR COMPANY.
No. 83-1792.

United States Court of Appeals,
Third Circuit.

Argued Aug. 10, 1984.
Decided Sept. 17, 1984.
As Amended Sept. 20, 1984.
Rehearing Denied Oct. 12, 1984.

OPINION OF THE COURT

JAMES HUNTER, III, Circuit Judge:

This appeal arises from a jury verdict in favor of appellees Patricia and Richard Conti and against appellant Ford Motor Company ("Ford"). The district court, 578 F.Supp. 1429, denied Ford's post-trial motions for a judgment notwithstanding the verdict and for a new trial. Because we conclude that the district court erred in not granting judgment in Ford's favor on the failure-to-warn theory, we reverse the district court's denial of Ford's motion for a judgment notwithstanding the verdict and remand for an order entering judgment on all claims in Ford's favor.

I.

Patricia Conti sustained serious injuries when, as she was in the process of entering a 1980 Ford Mustang on

the passenger side, her husband, appellee Richard Conti, turned the ignition key while the car was in gear without disengaging the clutch. Because the automobile was equipped with a standard transmission, Richard Conti's failure to disengage the clutch while starting the car in the reverse gear caused the car to lurch backwards. This lurching motion caused Patricia Conti to lose her balance and fall.

The Contis brought suit against Ford, seeking damages for Mrs. Conti's injuries sustained in the fall and for Mr. Conti's loss of consortium. Ford then joined Richard Conti as a third-party defendant, alleging that his negligence in starting the car while in gear and while the clutch was engaged was the cause-in-fact and proximate cause of Mrs. Conti's injuries, and thus that Ford was entitled to contribution from Mr. Conti.

The Contis' Complaint alleged that Ford was strictly liable for defective design and for failing to warn adequately of the dangers of starting a standard transmission car while in gear and while the clutch was engaged. The jury rejected the defective design claim, but found Ford liable on the failure-to-warn theory. The jury also found that Richard Conti was contributorially negligent, and that he was seventy-five percent responsible for the injuries suffered by Mrs. Conti. The jury awarded Mrs. Conti damages of $650,000 and Mr. Conti damages of $15,000, all against Ford.

The district court then entered judgment in favor of Mr. and Mrs. Conti for the amounts specified in the jury verdict. The district court also rejected Ford's arguments that Pennsylvania's comparative negligence and joint tortfeasors statutes accorded Ford the right of contribution from Mr. Conti, and thus entered judgment n.o.v. in favor of Mr. Conti on Ford's third-party claim. 42 Pa.Cons.Stat.Ann. §§7102, 8321 (Purdon's 1982).

II.

In seeking review of the judgment below, Ford has raised many issues for our consideration. These issues include the propriety of certain jury instructions given by the district court, whether Ford had a duty to warn of the allegedly obvious danger of starting a standard transmission car in gear while the clutch is engaged, whether Ford's Owner's Manual contained adequate warnings of this danger, whether the lack of an adequate warning was the proximate cause of Mrs. Conti's injuries, and whether Ford is entitled to contribution from Mr. Conti in light of the jury's finding that he was seventy-five percent responsible for the harm caused Mrs. Conti. Because we find that the district court erred in submitting the causation issue to the jury, however, we need not address all of these issues. Rather, we hold that Ford is entitled to judgment in its favor as a matter of law because the Contis have failed to prove that the existence of any additional warning may have forestalled Mr. Conti's "momentary inadvertence," App. at 357, in failing to disengage the clutch while starting the car in gear.

[1-3] The Pennsylvania courts have adopted section 402A of the Restatement (Second) of Torts, which imposes strict liability on the seller of any product "in a defective condition unreasonably dangerous to the user or consumer." *See, e.g., Incollingo v. Ewing*, 444 Pa. 263, 282 A.2d 206 (1971). Even if properly designed, a product may be in an unreasonably dangerous defective condition if its manufacturer fails to warn the user or consumer of latent dangers in the use or operation of the product. *See, e.g., Sherk v. Daisy-Heddon, A Division of Victor Comptometer Corporation*, 498 Pa. 594, 450 A.2d 615 (1982). Before strict liability will be imposed on a manufacturer for failure to warn adequately of latent dangers in the use of a product, however, the plaintiff must establish that the failure to warn adequately of such dan-

gers was the cause-in-fact and proximate cause of his or her injuries. *See, e.g., Greiner v. Volkswagenwerk Aktiengeselleschaft,* 540 F.2d 85 (3d Cir. 1976).

[4,5] Although the question of causation is normally for the jury, "if the relevant facts are not in dispute and the remoteness of the causal connection between the defendant's negligence and the plaintiff's injury clearly appears, the question becomes one of law." *Greiner,* 429 F.Supp. 495, 497 (E.D.Pa.1977), *on remand from* 540 F.2d 85 (3d Cir. 1976) (quoting *Liney v. Chestnut Motors, Inc.,* 421 Pa. 26, 29, 218 A.2d 336, 338 (1966)). Where the theory of liability is failure to warn adequately, the evidence must be such as to support a reasonable inference, rather than a guess, that the existence of an adequate warning may have prevented the accident before the issue of causation may be submitted to the jury.

III.

In the instant case, the Contis allege that Ford's failure to place a "reminder" warning in the car's interior resulted in Mr. Conti's negligent act in starting the standard transmission car while in the reverse gear and without disengaging the clutch. This negligent act then resulted in the backward movement of the car, which caused Mrs. Conti to lose her balance and fall, suffering injury. The district court submitted this issue of causation to the jury, which seemingly found that the lack of an adequate warning did result in Mrs. Conti's fall, thus rendering Ford strictly liable for the injuries suffered in the fall.

[6] We hold that the district court erred in submitting the causation issue to the jury and in not finding that the Contis had failed as a matter of law to show the connection between the existence of an adequate reminder warning and the possible prevention of the accident. As we read the record, there is no dispute as to the material facts. Mr. Conti was in his early forties at the

time of the accident. App. at 40. He had been driving standard transmission cars off and on since 1955. App. at 47. In fact, he had been in possession of the car involved in the accident for nine or ten months prior to the accident. App. at 25-26.

Mr. Conti had also read the Owner's Manual that came with the car, and which contained an instruction on pages 122-23 concerning operation of the car while in gear:

> On manual transmission vehicles, depress the clutch pedal and place the gear shift lever in the neutral position, as starter will operate while selector is in any gear.

App. at 184, 356. Mr. Conti testified that he could not remember reading this specific instruction, but that he knew that in "driving a standard transmission you would have to depress the clutch." App. at 46.

When questioned about the accident itself, and why he did not depress the clutch before he started the car, Mr. Conti testified: "I don't know why." App. at 46. Indeed, it is clear from the record that Mr. Conti was not paying attention to what he was doing when he started the car without disengaging the clutch. When asked to describe the accident, Mr. Conti stated:

> I was watching my wife walk around the front of the car. I reached over and opened the door. She was entering the car. Her one leg was suspended and *I was looking up talking to her* and I just reached over and started the car without depressing the clutch.

App. at 40 (emphasis added). The district court labeled this lack of attention by Mr. Conti "momentary inadvertence." App. at 357.

We find the evidence insufficient as a matter of law to support a reasonable inference that the existence of additional warnings may have prevented the accident from occurring. There is absolutely no evidence in the

record to suggest that Mr. Conti would have paid any greater attention to what he was doing when starting the car if additional warnings were contained in Ford's operator manual, or even if a sticker reminding the operator to disengage the clutch before starting the car in gear was prominently displayed in the interior of the car. Rather, the jury's conclusion was based on the mere speculation that if Mr. Conti's eyes had caught a sticker warning him to depress the clutch pedal as he was talking to his wife, he may have remembered to either shift the car to neutral or to disengage the clutch prior to starting the car. Ford cannot be held liable on a failure-to-warn theory merely because a jury concludes that more warnings are needed to remind drivers of the intricacies of standard transmissions. Rather, liability may result only when there is sufficient evidence that additional warnings or reminders may have made a difference. *See, e.g., Sherk v. Daisy-Heddon, A Division of Victor Comptometer Corporation*, 498 Pa. 594, 450 A.2d 615 (1982).

Finally, we note that our conclusion is supported by the jury's findings that Mr. Conti's negligence was seventy-five percent responsible for Mrs. Conti's injuries, and that the car involved was not defectively designed. Indeed, the sole basis of liability accepted by the jury seemed to be that Ford was liable for not placing additional reminder warnings in the car's interior. As stated above, however, because there is insufficient evidence in the record to support a reasonable inference that additional reminders may have forestalled Mr. Conti's negligence, the issue of causation should not have been submitted to the jury. Thus, we reverse the judgment below and remand for an order granting judgment in Ford's favor on all claims.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1792

PATRICIA CONTI and RICHARD CONTI,
husband and wife,
Petitioners

vs.

FORD MOTOR COMPANY,
and WINNER FORD J/S/A

vs.

RICHARD CONTI

Ford Motor Company, *Appellant*

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, *Circuit Judges*

The petition for rehearing filed by

APPELLEES, RICHARD CONTI
and PATRICIA CONTI

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in

regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

_____

Judge

Dated: October 12, 1984

Patricia CONTI and Richard Conti

v.

FORD MOTOR COMPANY

v.

Richard CONTI, Third-Party Defendant.
Civ. A. No. 81-2158.

United States District Court,
E.D. Pennsylvania.

Sept. 23, 1983.

MEMORANDUM AND ORDER

FULLAM, District Judge.

The wife-plaintiff, Patricia Conti, was seriously injured when, as she was in the process of entering, on the passenger side, a Ford automobile being driven by her husband, the plaintiff, Richard Conti, the vehicle suddenly and unexpectedly moved backward, throwing her to the ground. Contending that the accident was caused by a defective condition of the automobile, plaintiffs brought this action against the Ford Motor Company; the case went to trial solely on the issue of strict liability

under §402A Restatement (Second) Torts. The defendant caused a severance of the husband-plaintiff's claims, and joined him as a third-party defendant, on a negligence theory.

The automobile was equipped with a standard transmission, rather than an automatic transmission. In cars equipped with automatic transmissions, and also in standard-transmission cars manufactured by General Motors (and, until fairly recently, cars manufactured by Chrysler Corporation), it is impossible to start the engine while the transmission is engaged. But all Ford standard-transmission automobiles (as well as most foreign-make standard-transmission vehicles) lack a cutoff switch which would prevent activation of the starter while the clutch is engaged. If the starter is activated while the car is in gear, there are two possibilities: that the starter motor itself will cause the car to move; or, as occurred in this case, that activation of the starter will also start the engine of the car, which will then propel the vehicle.

The Ford automobile involved in this case was owned by the plaintiffs, and was customarily operated by the wife-plaintiff. The husband-plaintiff more frequently drove a van which was equipped with automatic transmission. On the occasion in question, the husband-plaintiff was about to drive his wife to visit a sick relative. The car had been parked in the plaintiffs' driveway, with the gear shift lever in reverse. As wife-plaintiff was entering the car, husband-plaintiff turned the ignition key to start the engine, but neglected to depress the clutch. The engine started, moving the car suddenly backward some five or six feet at which point husband-plaintiff succeeded in stopping the vehicle; unfortunately, the movement caused serious injuries to wife-plaintiff.

Plaintiffs presented the jury with two possible bases for imposing §402A liability upon Ford Motor Company: (1) that the vehicle was defective and unreasonably dangerous in its design, because of the absence of a cutoff device which would have made it impossible to start the

engine while the car was in gear, unless the clutch were depressed; and (2) that the defendant failed adequately to warn users of the dangers involved in attempting to start the engine with the car in gear. The jury's answers to special interrogatories imposed liability only on the failure-to-warn theory. The defendant's post-trial motions now before the court seek, *inter alia*, judgment n.o.v. on the ground that, as a matter of law, the warnings were adequate, and, in any event, any deficiency in the warnings was not a proximate cause of the accident.

The operator's manual provided by the manufacturer is a lengthy and detailed booklet. It contains approximately 81 warnings and cautions, in bold-face print, concerning various features of the vehicle. None of these warnings relate to the characteristic involved in this accident. The only relevant entry appears at pages 122-23 of the manual, in an inconspicuous portion of the text, and reads as follows:

> "On manual transmission vehicles, depress the clutch pedal and place the gear shift lever in the neutral position, as starter will operate while selector is in any gear."

It should be noted that this instruction concerning the proper method of starting the car does not, except perhaps by implication, alert the reader to the dangers involved if the start-up instructions are not precisely followed. It should also be noted that, elsewhere in the manual, the operator is warned not to rely exclusively upon the emergency brake when the vehicle is left unattended; instead, the operator is advised to park the car with the gear shift lever in reverse.

[1] In my view, the evidence clearly sufficed to permit the jury to conclude that the warnings given by the defendant were inadequate. It is significant that, in addition to answering the special interrogatories, the jury added the following comment:

> "We, the members of the jury, sincerely recommend that Ford Motor Company should install inside the cab of their cars warnings and/or cautions stressing the possible dangers of not following the operator's instructions exactly. Also, it should put more warnings and/or cautions in the operator's manual."

The evidence was also clearly sufficient to support the jury's finding that the absence of adequate warnings was a proximate cause of the accident. The husband-plaintiff did testify that he had read the operator's manual, and was generally aware that he should have depressed the clutch before attempting to start the engine of a stick-shift car; but, until this accident, he was totally unaware of the possibility that the engine would start and propel the car in such circumstances. In its entirety, the husband's testimony leads one to conclude that he was guilty of momentary inadvertence, either in forgetting that the car had a stick-shift, or in overlooking the necessity of depressing the clutch before turning the ignition key. It was not unreasonable for the jury to conclude that the accident would not have occurred if the manufacturer had provided warnings adequate to alert the operator to the dangers involved. While it is probably true that most persons familiar with stick-shift automobiles are aware that such vehicles can be caused to move by activating the starter alone, it cannot be ruled as a matter of law that all operators are chargeable with knowledge that the motor will start under such circumstances, and "really" move the vehicle rapidly and substantially. Moreover, there was evidence to the effect that approximately 90% of all automobiles on America's highways today are equipped with automatic transmissions. The jury might well have concluded that it was inappropriate for the manufacturer to assume widespread familiarity with stick-shift transmissions. The husband-plaintiff was not, under the evidence, consciously testing a known dan-

ger, nor was his momentary inadvertence unforeseeable, so as to constitute superseding negligence. The jury's finding of proximate cause cannot properly be disturbed.

[2, 3] I have considered the various contentions urged in support of a new trial, but have concluded that the issues were fairly and properly presented to the jury, whose decision must stand. I perceive no error in permitting the jury to view a filmed re-enactment of the start-up of the vehicle; this was merely helpful demonstrative evidence, and the differences between the re-enactment and the actual accident were clearly and repeatedly explained. If the jury accepted the testimony of plaintiffs and their medical witnesses, as the jury obviously did, the verdict was not notably excessive. The evidence tended to establish that, as a result of her injuries, the wife-plaintiff suffered a neurogenic bladder, resulting in complete and permanent loss of urinary control, necessitating self-catheterization six or seven times per day and night, for the rest of her life. The jury's award of $650,000 was perhaps generous, but not so excessive as to warrant judicial intervention.

[4] A principal thrust of defendant's post-trial motions and, in my view, the only substantial issue remaining in this case, relates to the possible application of Pennsylvania's comparative negligence statute and/or the statute providing for contribution among joint tortfeasors. *See* 42 Pa. Cons.Stat.Ann. §§7102 (comparative negligence), 8324 (joint tortfeasors) (Purdon Supp.1982). As noted above, the liability of the defendant was predicated solely upon §402A of the Restatement (Second) Torts, but defendant asserted a third-party complaint against the husband-plaintiff, alleging that he was negligent and that his negligence was a proximate cause of the accident and injury. Because of uncertainty concerning the applicability of the comparative negligence and joint tortfeasors statutes in the product-liability context, and in order to establish a factual predicate for a later determination of these issues, it was agreed by all concerned

that the jury should be asked to determine the "percentage of causation" as between the defendant and the husband as third-party defendant. In addition to imposing 402A liability on the defendant, the jury further found that the husband was guilty of negligence, and that his negligence represented 75% of the cause of the accident; the jury assigned 25% of the causation to the defendant manufacturer. Shortly after the conclusion of the trial, I filed a brief Memorandum reflecting my tentative conclusion that the Pennsylvania Supreme Court would probably not invoke the comparative negligence doctrine in product-liability cases. Thus, judgment was entered in favor of both plaintiffs for the full amounts of the jury's awards, and judgment n.o.v. was entered in favor of the husband on the third-party complaint. The defendant's motions now seek reconsideration of the comparative negligence issue, and assert, alternatively, that contribution should be permitted.

The defendant correctly argues that the comparative negligence doctrine is now invoked in product-liability cases in many jurisdictions. See, *e.g.*, *Brinkerhoff v. Swearingen Aviation Corp.*, 663 P.2d 937 (Alaska 1983); *Duncan v. Cessna Aircraft Co.*, No. C-1443 (Tex. July 13, 1983). See also *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*, 565 F.2d 1129 (9th Cir. 1979) (federal admiralty jurisdiction); *Safeway Stores, Inc. v. Nest-Kart*, 21 Cal.3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978); *West v. Caterpillar Tractor, Inc.*, 336 So.2d 80 (Fla.1976); *Kaneko v. Hilo Coast Processing*, 654 P.2d 343 (Haw.1982); *Dippel v. Sciano*, 37 Wis.2d 443, 155 N.W.2d 55 (1967). It is fair to state, however, that most of these decisions derive from the premise that strict product-liability is akin to "negligence *per se*" or some similar form of "fault". Some courts have based such decisions on the conclusion that such "fault" is within the reach of the comparative negligence statute enacted by

the legislature, while other courts, recognizing that the statute does not apply, reach the same result by a judicially created analogous rule.

The principal authority relied upon by the defendant is the decision of our Court of Appeals in *Murray v. Fairbanks Morse*, 610 F.2d 149 (3d Cir.1979). In a comprehensive and scholarly opinion by Judge Rosenn, the court there held that the Virgin Islands comparative negligence statute was properly applicable to products-liability cases under the law of the Virgin Islands.[1] There are, however, several reasons which persuade me that the *Murray* decision is not a reliable indicator of the direction of the likely development of Pennsylvania law.

In the first place, the *Murray* court was dealing with a different comparative negligence statute. The Virgin Islands statute specifically excepted from its operation cases involving absolute liability. *See* V.I. Code Ann. Tit. 5, §1451(b) (Supp.1982). The Third Circuit was able to conclude from this that the legislature did not intend to remove from the statute's operation cases involving mere strict liability, as opposed to absolute liability. The Pennsylvania comparative negligence statute, on the other hand, contains no exceptions clause, and simply does not lend itself to the same kind of analysis. *See* 42 Pa.Cons.Stat.Ann. §7102 (Purdon Supp.1982).

There are, however, factors common to both the Virgin Islands and Pennsylvania, and, indeed, to most jurisdictions, which tend to support defendant's argument that the *Murray* holding should be equally applicable un-

1. Initially, the defendant also cited the opinion of a panel of the Pennsylvania Superior Court in *Dambacher v. Mallis*, No. 1725/82 (Pa.Super.Ct. June 17, 1983), which seemingly upheld a lower court decision awarding contribution in a products-liability case on the basis of the Pennsylvania comparative negligence statute. That opinion has since been effectively withdrawn, by the grant of reargument on August 23, 1983. Moreover, it is not at all clear that the panel had actually focused upon the issues under discussion in the present case.

der Pennsylvania law. In both jurisdictions, when strict product-liability under §402A was first incorporated into the law of that jurisdiction, contributory negligence was an absolute bar to recovery in negligence actions. It was made clear that, under §402A, contributory negligence of the user of the product would not prevent recovery on strict-liability grounds. Thereafter, the contributory negligence doctrine was legislatively moderated by enactment of a comparative negligence statute. The question became, and remains, whether this change in the law of contributory negligence justifies re-examination of the question whether contributory negligence should not now be partially re-admitted as a defense in product-liability cases.

In diversity cases such as this one, the role of a federal court is to predict the answer which would be given by the Pennsylvania Supreme Court to these questions. Would the Pennsylvania Supreme Court construe the Pennsylvania comparative negligence statute as applicable in the products liability context? If not, would the Pennsylvania Supreme Court consider the comparative negligence statute a sufficient justification for formulating and applying an analogous modification of §402A law? It must be remembered that a federal appellate court has a somewhat greater role in the developing law of the Virgin Islands than in the developing law of Pennsylvania. The *Murray* decision makes it quite clear that the Third Circuit Court of Appeals views comparative fault as the preferable rule in product-liability cases, but this court is not free to follow that lead if it represents a departure from the discernible trend of Pennsylvania decisions.

Like the Virgin Islands statute, the Pennsylvania Comparative Negligence Act applies only in "actions brought to recover damages for *negligence*. . . ." 42 Pa.Cons.Stat.Ann. §7102(a) (Purdon Supp. 1982). The two statutes differ, as mentioned above, in the fact that the Virgin Islands statute contains a section stating that the statute "does not apply to any action based upon a

statute the violation of which imposes absolute liability, whether or not such statute comprehends negligent conduct." V.I.Code Ann. Tit. 5, §1451(b) (Supp.1982). And the Pennsylvania statute is more explicit in stating that what is to be compared is the "causal *negligence*" of the parties. 42 Pa.Cons.Stat.Ann. §7102(a) (Purdon Supp. 1982). The Pennsylvania Supreme Court, perhaps more than any other state appellate court in the nation, has been emphatic in divorcing negligence concepts from product-liability doctrine. *See, e.g., Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975); *Azzarello v. Black Brothers Co., Inc.*, 480 Pa. 547, 391 A.2d 1020 (1978). As the Court of Appeals has noted,

> "We read *Azzarello* as a signal that evidence and jury instructions regarding negligence concepts should be kept out of cases brought under §402A." *Holloway v. J.B. Systems, Ltd.*, 609 F.2d 1069, 1973 (3d Cir.1979) (footnote omitted).

In my view, it is extremely unlikely that the Pennsylvania Supreme Court would hold that the comparative negligence statute directly governs product liability cases; that is, I believe it unlikely that, given *Azzarello*, that court would hold that the liability of a manufacturer for a defective product is equivalent to "causal negligence" which is to be apportioned under the statute.

It is nevertheless perhaps arguable that the Pennsylvania Supreme Court might yet conclude that passage of the Comparative Negligence Act justifies modification of the established rule that contributory negligence (as distinguished from voluntary assumption of the risk) is irrelevant in product-liability cases. On that issue, the sign posts are, arguably at least, less legible. In *Rutter v. Northeastern Beaver County School District*, 496 Pa. 590, 437 A.2d 1198 (1981), the Pennsylvania Supreme Court voted 4 to 3 to reverse a lower court decision which had granted a compulsory non-suit on the ground of voluntary assumption of the risk. Three of the four justices

joined in an opinion which would have totally abolished the doctrine of assumption of risk in Pennsylvania as counter-productive and unnecessary in view of the enactment of the Comparative Negligence Act, while retaining the doctrine of assumption of risk in product-liability cases under §402A. A fourth justice concurred in the result, but did not join in the plurality opinion. Of the dissenting justices, one found it unnecessary to reach the assumption-of-risk issue, another believed the doctrine should be retained in all cases, and the third dissenter joined in both of the other dissenting opinions.

While the ultimate fate of the assumption-of-risk doctrine in Pennsylvania is not of present concern, the *Rutter* case is important to the present decision: It is clear that at least three, and perhaps a majority, of the members of the Pennsylvania Supreme Court hold the view that the comparative negligence statute satisfactorily answers all questions of relative fault in negligence cases; but they would retain the assumption-of-risk doctrine in §402A cases. In my view, this constitutes a strong signal that the court would not apply comparative fault or its equivalent in product-liability cases.

[5] At the very least, I am satisfied that a judicially imposed doctrine of comparative fault (or comparative degree of causation) in product-liability cases would represent a significant departure from the present law of Pennsylvania, not within the province of a federal court exercising diversity jurisdiction.

Finally, and quite apart from the restrictions imposed by this court's merely predictive role, I note that it is far from clear that the *Murray* decision would require the result sought by defendant in this case. In *Murray*, and in most if not all of the cases applying comparative fault or comparative causation in product-liability cases, the courts were dealing with what might be termed independent or additional negligence on the part of the user of the defective product; that is, negligence other than mere failure to learn of, and guard against, the defect

alleged. In *Murray*, for example, there was evidence that the plaintiff was pursuing a dangerous method of installing the equipment in question, and was not exercising reasonable care for his own safety, in ways totally unrelated to the inadequate welds which rendered the product defectively dangerous. Notwithstanding the generality of the language in the *Murray* opinion, it is reasonable to suppose that the court might reach a different conclusion in a case, for example, where the operator of a vehicle is traveling at grossly excessive speeds when the wheel falls off, than in a case in which the operator merely was negligent in failing to inspect the wheel and observe that its fastenings were inadequate. And the concurrent negligence of a third party, such as an employer who fails to supply guarding omitted by the manufacturer, falls more comfortably within the comparative-fault realm than the negligence of a user of the product, when his negligence consists of failure to discover the defect or to avoid the harm. Invocation of the comparative-fault doctrine in the latter situation would severely undermine the policies served by §402A strict liability.

[6] For all of these reasons, I have concluded that comparative-fault doctrine has no place in this litigation. For the same reasons, and also because the strict liability of the manufacturer is not on the same legal plane as the negligence of the user, *see Rhoads v. Ford Motor Co.*, 374 F.Supp. 1317, 1320 (W.D.Pa.1974), *aff'd on other grounds*, 514 F.2d 931 (3d Cir.1975), the Joint Tortfeasors Act is inapplicable here.

I therefore conclude that judgment was properly entered in favor of both plaintiffs in the full amounts awarded them by the jury, and that judgment was properly entered against the manufacturer on its third-party claim. In view of these conclusions, it is unnecessary to consider whether the jury's assessment of relative causation finds adequate support in the evidentiary record.

RICHARD CONTI, sworn.

DIRECT EXAMINATION

BY MR. BINNS:

Q Mr. Conti, what is your age, sir?

A 45.

Q Are you married to Patricia Conti?

A Yes, sir.

Q For how long?

A Almost 20 years.

Q Where do you reside?

A 718 Crum Creek Road in Broomall, Pennsylvania.

Q Were you the operator of a 1980 Ford Mustang on November 11, 1980?

A Yes, sir.

Q Tell the jury what happened that day.

A We were going to visit my mother in a nursing home and I happened to get in the car first. I was watching my wife walk around the front of the car. I reached over and opened the door. She was entering the car. Her one leg was suspended and I was looking up talking to her and I just reached over and started the car without depressing the clutch. The car hit her, the front door hit her into the back post. She fell under the car. If I don't quick stop the car I run over her. Her leg —

Q Did you stop the car?

A Yes, sir.

THE COURT: It may be implicit in your answer but was the car moving backward or forward at that time?

THE WITNESS: Backward, sir.

BY MR. BINNS:

Q Now, had you parked the car in reverse prior to that time that you started?

A I didn't this particular time but we always do park it in reverse. The manual tells you to park it in reverse.

Q What did you then do with respect to your wife?

A Well, I believe, if you can understand what kind of shock I was in, I believe — my mother-in-law had just closed the door. She was like waving good-by to us. I believe she didn't see us leave. So she looked out and I said, "Call a doctor, Pat fell down." I don't know what I said just to hold her from getting hysterical and I pulled gently Pat from under the car, tried as best I could to pick her up, put her in the car and I drove her around to our family doctor which is only on the other side of the road there right around the corner.

Q Did the doctor see her?

A Yes, sir. He was out on the porch waiting for us and he walked over and he gave us an examination with his hands and he said immediately take her to the hospital for x-rays.

Q And you did that?

A Yes, sir.

Q All right, now, Mr. Conti, getting back to the happening of this incident, do you drive an automatic transmission car in addition to the stick shift car?

A Yes.

Q What is your procedure for starting the automatic car?

A You get in, turn the key on.

Q Had this type of incident ever occurred to you before when you drove this or a standard transmission?

A No, sir.

MR. BINNS: No further questions.

CROSS-EXAMINATION

BY MR. PINTO:

Q Now, Mr. Conti, when did you buy this car?

A I believe in November of '80 — we ordered it, I believe, in November of '80.

Q And when did it come into your possession?

A I am sorry, November of '79 and —

Q The accident happened in November of '80, correct?

A Yes.

Q And you bought it a year before that?

THE COURT: Approximately.

THE WITNESS: Yes, approximately.

BY MR. PINTO:

Q You ordered it a year before that and it took a while for the car to be delivered. So you came in possession of it early in 1980; isn't that right?

A I believe it was February of 1980.

Q All right. So you owned the car you say January?

A I believe it was February.

THE COURT: February.

MR. PINTO: February, excuse me.

BY MR. PINTO:

Q So you owned the car nine or ten months before the accident?

A Yes, sir.

SIDE BAR OMITTED

BY MR. PINTO:

Q Now, I believe you also testified you drove a car that had automatic transmission?

A That is correct.

Q Whose car was that?

A The company car.

Q The company you worked for?

Q Yes.

Q What kind of a car?

A Well, at that particular time it was a van, now it is a station wagon.

Q I am not talking about now, just before this incident occurred.

A A van.

Q It had automatic transmission?

A Yes, sir.

Q Didn't you also about that time drive a GM truck or previous to that time in your business that had standard transmission?

A Yes.

Q And in that GM truck it had the standard transmission, didn't you have to depress the clutch before the car would start?

A Yes.

Q And when you got in this Ford Mustang you knew it was a standard transmission, didn't you?

A Yes.

Q Why didn't you depress the clutch before you started it?

A I don't know why.

Q Isn't it a fact that you reviewed this owner's manual when you bought the car?

A Yes.

Q As a matter of fact, you knew from the owner's manual that the reverse gear acted as the parking gear for the vehicle?

A Correct.

Q And when you parked it you would put it in reverse gear?

A Yes.

Q And didn't the owner's manual also tell you that you should depress the clutch when you start the vehicle?

A I believe — I don't know if I specifically read that but I know work, driving a standard transmission you would have to depress the clutch.

Q And —

A If you didn't depress the clutch it wouldn't start.

Q General Motors car?

A Well, any car that I have ever driven.

Q Well, didn't you once drive a car when you were a young man that had standard transmission where the engine would turn over if you didn't depress the clutch?

A Not without engaging the clutch. You have to let the clutch out — you mean to inch it over if something happened to the car?

Q Sure.

A You had to engage the clutch.

Q You had to engage the clutch?

A Yes, I believe so. That it was 1955 to my recollection. I believe you had to engage the clutch. You had to sort of pop the clutch.

Q You couldn't start the car in 1955 without engaging the clutch?

A I don't believe so.

Q Let me tell you the evidence will show that it wasn't until the 1970's that General Motors put that on their cars and before that all the General Motors cars as well as —

THE COURT: I don't think this is a question. I don't think it is cross-examination. You may ask the witness.

MR. PINTO: Well, I am going to present the evidence, Your Honor.

THE COURT: That is fine. Don't tell the witness all about what you are going to do. Do you have a question of the witness?

BY MR. PINTO:

Q All right, Mr. Conti —

A Yes, sir.

Q — it is still your position that you couldn't start the standard transmission vehicle you had back in the '50's without depressing the clutch. Is that correct?

A I believe — to the best of my recollection, that is quite a few years ago.

Q But you knew back then that you could, if your car became disabled, utilize your transmission and your starter to move the vehicle out of a place of danger if you stalled it?

A Yes, I believe so.

THE COURT: I wonder if I could just ask a couple of questions because it seems to me we are using the

term start the car in perhaps two different ways. Maybe counsel in their questions could clarify this.

It is one thing to say that the starter motor will not turn over. It is another thing to say that the engine will not actually begin to function and it is possible there could be a distinction.

MR. PINTO: Well, I am not sure this witness is qualified to respond to that. I think the engineers will, Your Honor.

THE COURT: I just hope sometime before the case is over that will be clarified.

MR. PINTO: It certainly will, Your Honor.

THE COURT: Okay.

BY MR. PINTO:

Q Weren't you under the impression just before this accident that all standard transmission vehicles had to have their clutches depressed before the engine would turn over and start?

A Yes.

MR. PINTO: That is all I have. Thank you.

THE COURT: Anything further?

MR. BINNS: No, sir.

THE COURT: You may step down. Thank you, sir.

Supreme Court, U.S.
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84-1129

No. 84-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

PATRICIA CONTI and RICHARD CONTI,
husband and wife,
Petitioners

v.

FORD MOTOR COMPANY,
Respondent

SUPPLEMENTAL APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

WARNING—If your vehicle is equipped with Electronic Engine Controls use of a radio transmitter other than a properly-installed CB may cause the vehicle's engine to idle roughly, hesitate or stall. If the engine stalls, power options such as power brakes and power steering will stop working. Always consult your Ford or Lincoln/Mercury dealer for an accessory component before installing or using a radio transmitter (other than a properly-installed CB) in this vehicle.

Starter Operation

The START position on the ignition lock cylinder is used to crank the engine. Before turning the key, make sure the parking brake has been set. Place the automatic transmission lever in P

(PARK) or N (NEUTRAL). On manual transmission vehicles depress the clutch pedal and place the gearshift lever in the NEUTRAL position, as starter will operate while selector is in any gear.

Avoid excessive cranking (in excess of 30 seconds) with an intermittently firing or flooded engine. To avoid starter overheat or damage, do not crank the starter *continuously* for more than 30 seconds at a time. If the engine fails to start within the period mentioned above, wait 2 minutes before again attempting to start the vehicle.

CAUTION—If the engine stalls or falters in starting, wait 3 or 4 seconds before re-engaging the starter. This will prevent possible serious damage to the starter or engine.

Towing speed is to be limited to 50 mph (80 km/h) with the driving wheels off the ground and on a smooth surface. For wrecker towing on rough pavement, the maximum towing speed is 35 mph (57 km/h). 35 mph (57 km/h) maximum towing speeds should be used whenever the tow truck operator is not sure of road surface condition.

When a vehicle is pulled on its front wheels, the steering wheel must be clamped in the straight ahead position with a steering wheel clamping device designed for towing service use, such as provided by towing manufacturers.

Trailer Towing

It is important to your safety and to the care of your car to properly match the trailer towing equipment with that of the trailer and to carefully follow all vehicle and trailer loading recommendations. Make sure that all towing equipment is properly and safely attached to your car. Your dealer will be happy to supply you with this information upon your request. Following is some general information which you may find helpful.

CAUTION—The 2.3L and 2.3L Turbocharged engine is not designed for the purpose of towing trailers. Towing trailers may result in damage to the engine.

CAUTION—If the ignition key is not available to unlock a steering column where applicable, place a dolly under the rear wheels and tow the vehicle with the front wheels raised. Do not use the vehicle's steering column lock to secure the wheels in straight ahead position when pulled from the rear.

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SITUATIONS

CAUTION—Towing a trailer puts additional loads on your vehicle's engine and drivetrain. Be sure to refer to the notes in the "Scheduled Maintenance Services" section when towing a trailer for long distances.

CAUTION—DO NOT USE OVERDRIVE WHEN TOWING A TRAILER.

Hitches

Use a good quality non-equalizing hitch for towing Class I trailers up to 2000 pounds (900 kg) gross loaded weight with a maximum tongue weight of 200 pounds (90 kg). Towing trailers over 2000 pounds (900 kg) gross trailer weight exceeds the limits of the vehicle and is not recommended.

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Powertrain

Recommended powertrain requirements for towing typical Class I trailers with up to 200 pound (90 kg) tongue is as follows:

1000-1500 Pound GTW	1500-2000 Pound GTW
• 3.3 Litre (200 CID) Engine	• 4.2 Litre (255 CID) Engine
• Automatic Transmission	• Automatic Transmission
• Power Brakes	• Power Brakes

For long distance/high speed towing, an external dealer-installed transmission oil cooler installation is recommended.

Four-cylinder engines and/or manual transmission should not be used for trailer towing purposes where gross trailer weight (GTW) exceeds 1000 pounds/100 pound (450 kg/45 kg) tongue load.

High Altitude Towing

Trailer towing at high altitudes reduces vehicle performance and towing ability. For improved performance in high altitude areas,

calculating your total vehicle load. First, weigh your vehicle without the driver, passengers, and luggage. Then weigh your vehicle with the driver, passengers, luggage and trailer attached. Subtract the two weights to find out the vehicle load. If the vehicle load is greater than the rated load capacity shown on the tire decal, remove enough weight from the vehicle to bring the load down to the rated load capacity. When towing a trailer, it is recommended that the tire pressure be increased 4 psi (28 kPa) over that shown on the tire decal. Do not exceed the maximum inflation pressure given on the tire.

reduced trailer weight can increase towing ability and braking performance.

NOTE–It is recommended that trailers over 1000 pounds (GTW) be equipped with trailer brakes.

Vehicle Load

NOTE–In no case should you exceed the gross axle load ratings (GAWR front and rear) and the gross vehicle rating (GVWR) as shown on the vehicle certification label.

To figure your vehicle load with a light duty trailer, add the actual weight of the driver, passengers, luggage, any extra equipment and the tongue load of your trailer. If additional equipment has been added to your vehicle since delivery, don't forget to include this weight in figuring your load. If you don't know the individual weights of the driver, passengers, luggage, extra equipment, and tongue load, here is another method for

CAUTION–The cargo load should be restrained properly and evenly distributed to avoid vehicle damage due to the cargo shifting during acceleration or braking.

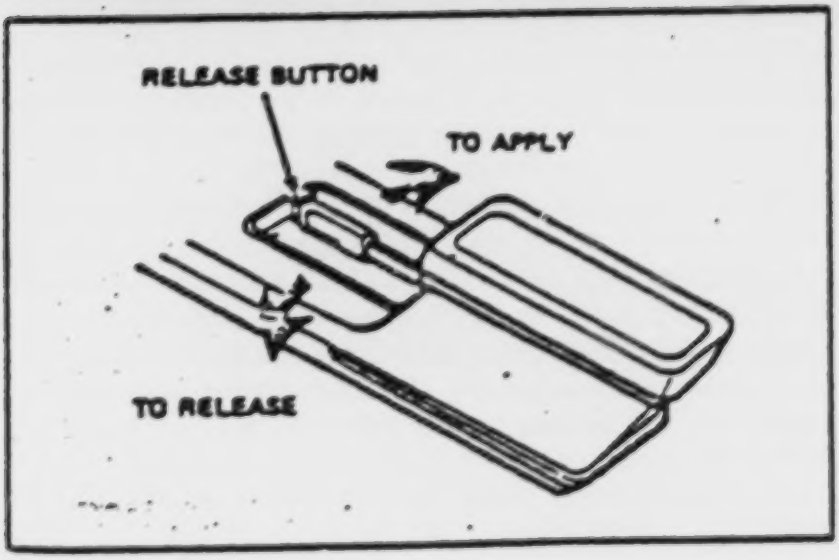
CAUTION–Bumper hitches are not recommended, nor should safety chains be attached to the bumper. However, multi-clamp type hitches, for the occasional use of a rental trailer, are safe as long as you install them properly and follow the usage and towing instructions of a reputable rental agency. Single clamp bumper hitches and hitches which attach to the vehicle's axle should not be used.

through normal usage. The rear drum brakes adjust automatically each time you apply the brakes while moving in reverse.

> CAUTION—Do not drive with your foot resting on the brake pedal. "Riding" the brakes may result in abnormally high brake temperatures, excessive lining wear and increased stopping distances.

When the front disc brakes have a limited amount of lining wear remaining, an audible squeal will be generated each time the brakes are applied with the car in motion; the intensity of the sound will gradually increase with continued lining wear.

Occasional or intermittent brake squeal may result from environmental conditions such as cold, hot, wet, snow, salt, mud, etc. This condition is not a functional one and will not affect braking



effectiveness. Only if squeal occurs continuously with every application should the brakes be checked.

NOTE–The front disc brake wear indicators will squeal when the front brakes have limited wear remaining and the brakes are applied. Have the brakes checked as soon as practical to preclude complete brake lining wear-out and subsequent damage to the rotor(s).

Parking Brake

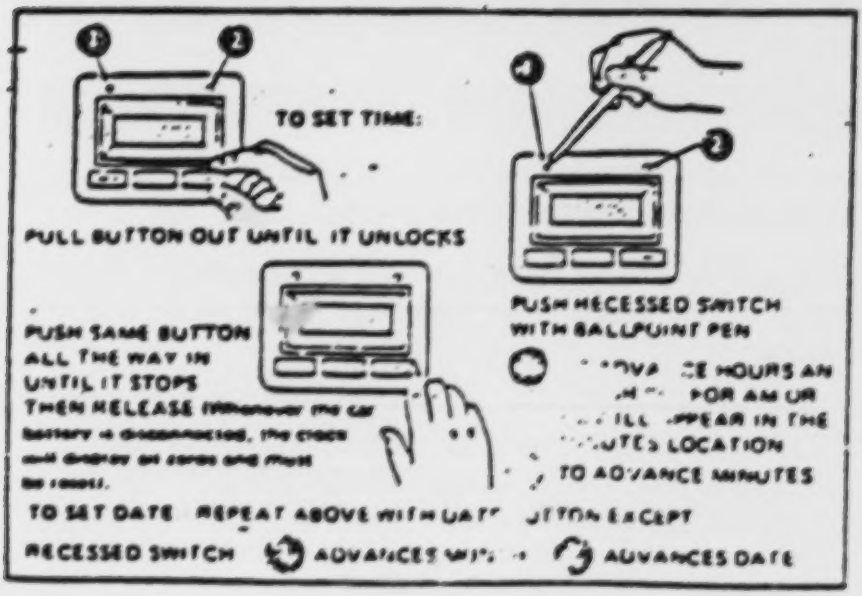
> WARNING–Always make sure your transmission is in P (PARK) before leaving the driver's seat, if you have an automatic transmission. Do not use R (REVERSE) or N (NEUTRAL). For cars with manual transmissions, shift into reverse gear. Set the parking brake. Remove your ignition key. Lock all doors.

The parking brake control is located between the front seats. Pull the handle upward to apply parking brake.

To release the parking brake, lift upward on handle and push the button on the handle, then lower the handle to the released position.

> CAUTION–Always check the BRAKE WARNING LIGHT each time you start the engine. This light will glow with the word BRAKE when the engine is running and your parking brake is set. Failure to release the parking brake will result in poor fuel economy and rapid brake wear.

WARNING—If the parking brake is released and the BRAKE light remains on after you have started the engine, this is an indication of a malfunction in the brake system. Immediate attention is necessary. Do not drive the vehicle.



Electronic Digital Clock

This optional clock displays either time, date or elapsed time. The date will also be displayed for a few seconds when the car is started or when the ignition switch is in the ACC position. E/T will display minutes and seconds for 60 minutes and will then display hours and minutes. Time or date can be displayed when the ignition is OFF by pushing the time or date button.

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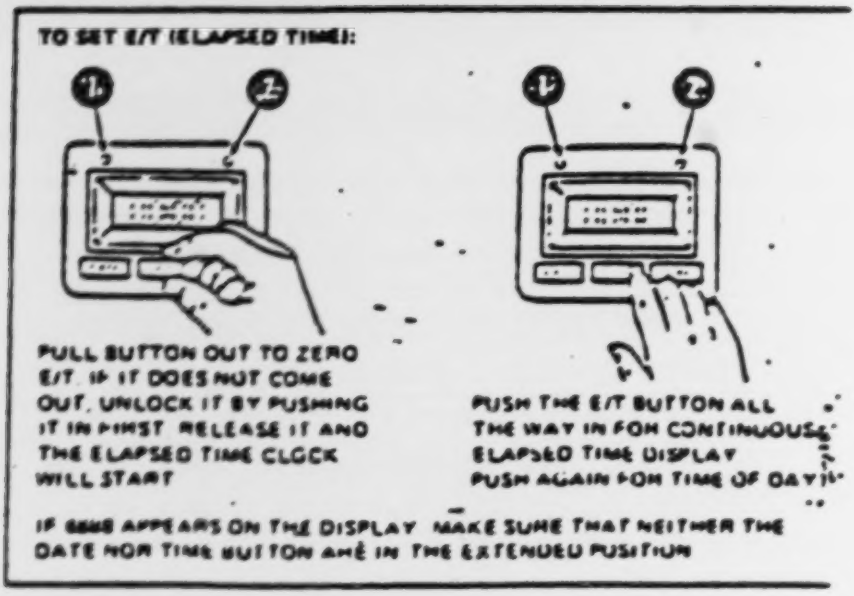
TO SET E/T (ELAPSED TIME):
PULL BUTTON OUT TO ZERO E/T. IF IT DOES NOT COME OUT, UNLOCK IT BY PUSHING IT IN FIRST. RELEASE IT AND THE ELAPSED TIME CLOCK WILL START
PUSH THE E/T BUTTON ALL THE WAY IN FOR CONTINUOUS ELAPSED TIME DISPLAY. PUSH AGAIN FOR TIME OF DAY.
IF 8888 APPEARS ON THE DISPLAY, MAKE SURE THAT NEITHER THE DATE NOR TIME BUTTON ARE IN THE EXTENDED POSITION

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Here are some starting tips:

- Turn off your headlights while you crank the engine. This will reduce the electrical load on your battery and supply extra power to the starter motor.

- In a cold engine starting situation, when the outside air temperature is below 10 degrees F (−12.2 degrees C) or when the vehicle has been idle for several days, depress the accelerator two or three times before starting.

Engine Block Heater

The optional engine block heater is used to warm the engine coolant which improves starting, provides for faster engine warm-up, and results in quicker response from heater-defroster system. It is recommended for use whenever the outside temperature is 0°F or below (−17.8°C or below). The heater is plugged into a grounded 110 volt outlet (household system) and

servicing, selling, leasing, or trading motor vehicles, as well as fleet operations from knowingly removing or rendering an emissions control system inoperative after sale and delivery to an ultimate purchaser. In Canada, modifications of the emissions control system could create liability under applicable Federal or Provincial laws.

Starting and Operating Precautions

Avoid damage to the vehicle or possible harm to yourself. Follow these precautions:

- Avoid excessive starter cranking (in excess of 30 seconds) with an intermittently firing or flooded engine. To avoid starter overheat or damage, do not crank the starter *continuously* for more than 30 seconds at a time. If the engine fails to start within the period mentioned above, wait 2 minutes before again attempting to start the vehicle.

consumes about 600 watts of power. For best results the heater should be plugged in at least three hours prior to starting. The use of the heater for longer periods of time will not cause the engine coolant to exceed the thermostat setting.

> CAUTION—Unplug heater cord and secure it to the vehicle prior to moving the vehicle.

Emissions Control System

When you take your vehicle to the dealer to be serviced, please do not ask him to modify any part of the emissions control system of your car. Modifications of the emissions control systems could create liability under Federal law (U.S.) if made prior to the first sale and registration, and under the laws of some states, if made thereafter. Further, Federal law prohibits vehicle manufacturers, dealers and other persons engaged in the business of repairing,

- Avoid attempting to start a vehicle by pushing. Instead, use jumper cables as described in the "Special Situations" section of this guide. (Vehicles with automatic transmissions cannot be started by pushing.).
- Avoid extended (in excess of 10 minutes) and unnecessary idling, particularly extended idling on the high step of the fast idle cam or at other high engine speeds or after sustained high speed operation. If extended idling occurs or is anticipated beyond 10 minutes, turn off the engine. Within 30 seconds after starting the engine, depress and release the accelerator pedal to produce a lower idle speed. Always avoid idling in dry grass or other dry ground cover. (See maintenance recommendations with regard to keeping grass shields free of debris.)

• Do not make unauthoriz d modifications to the engine or vehicle. Modifications causing increased amounts of unburned fuel to reach the exhaust system (including the catalytic converter) can significantly increase the temperature of the engine compartment and/or the exhaust system.

• Avoid operation under conditions of malfunction or neglect (disregard for recommended maintenance on the ignition system, fuel system, and emissions control system). It is important that you have your vehicle examined at the first indication of any significant depreciation in its normal performance. Such indications include, but are not limited to, extended dieseling (more than 5 seconds of engine run-on with the ignition lock cylinder key off), persistent misfiring, heavy surging, repetitive stalls or backfires, fluid leakage, odor, smoke, loss of oil pressure, or charge indicator or overtemperature warning.

Carbon monoxide is colorless and odorless, but can be present with all other exhaust fumes. Therefore, if you ever smell exhaust fumes of any kind inside your vehicle, have it inspected immediately by your dealer and have the condition corrected. Do not drive with exhaust fumes present.

In order to guard against the possible entry of carbon monoxide into your vehicle, the exhaust system and body ventilation system should be properly inspected by a competent mechanic as follows:

• Each time the vehicle is raised for service;

• Whenever you detect a change in sounds from the exhaust system;

• Whenever the vehicle has been damaged by an impact.

Exhaust Fumes

WARNING–EXHAUST GASES, PARTICULARLY CARBON MONOXIDE, ARE HARMFUL AND ARE POTENTIALLY LETHAL.

NEVER SIT IN A PARKED OR STOPPED VEHICLE FOR ANY EXTENDED AMOUNT OF TIME WITH THE ENGINE RUNNING.

NEVER LEAVE YOUR CAR UNATTENDED WHILE THE ENGINE IS RUNNING.

In order to afford proper ventilation, all air inlet vents should be kept clean of snow, leaves, and other debris.

WARNING–NEVER IDLE ENGINE IN CLOSED AREAS.

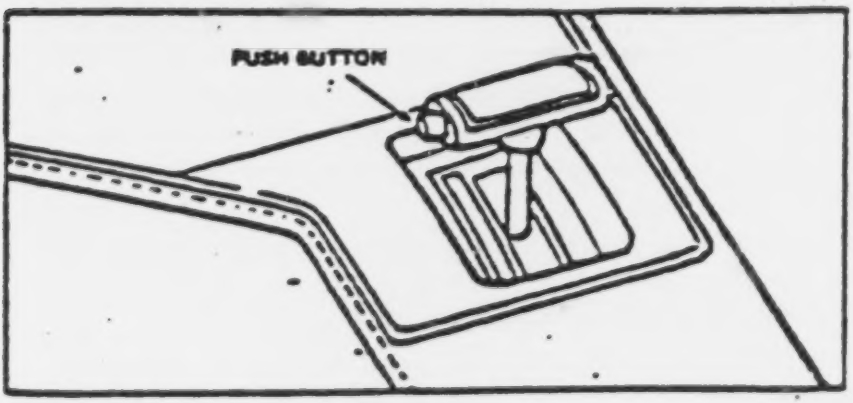
If you run the engine while stopped (idle) in an unconfined area, open the windows at least 1 inch and adjust the heating, air conditioning or ATC controls to draw outside air into vehicle as follows:

- HEATING–Close right vent, set fan speed on medium or high with function control lever on heat or defrost and the temperature control lever on any desired position.
- AIR CONDITIONING–Set fan speed on medium or high with function control lever on any position *except off* and the temperature control lever at mid-position.

• AUTOMATIC TEMPERATURE CONTROL (ATC)–Set fan speed on medium or high with function control lever in heat or defrost position and the temperature control lever at any desired position. Cold engine start will require approximately a 3-5 minute delay.

WARNING–Engine compartment and exhaust system temperatures may be higher due to emission control devices needed to comply with government mandated emission standards.

automatically latch when it is fully in P (PARK) and the push button will pop out. The button must be depressed to shift out of P (PARK) position.



Driving With 3-Speed Automatic Transmission

Gear Selector Positions

Your automatic transmission provides you with either fully automatic operation in the D (DRIVE) position or manual control by allowing you to start in either the 1 (FIRST) or 2 (SECOND) positions and then to upshift manually to the next gear. If your vehicle is equipped with a column shift selector, move the lever by first pulling the lever toward you. If your vehicle is equipped with a floor shift, press the push button on the end of the selector lever to move the lever to the various selector positions. The following are explanations of the selector positions.

P (PARK)—This position locks the rear wheels and the transmission whether or not the engine is running. Always come to a complete stop before shifting into P (PARK). The lever will

WARNING—Do not use the P (PARK) position in place of the parking brake. Shift into P (PARK) and set the parking brake. Turn off the ignition when you leave the vehicle, even momentarily. Never leave the vehicle unattended while the engine is running.

CAUTION—In shifting into the P (PARK) position, make sure that the shift lever has been pushed as far as it will go in a counterclockwise direction and cannot be moved back in a clockwise position without first being lifted towards you. On floor shift models the lever should be pushed as far forward as possible and should not be able to be moved without pushing the release button.

R (REVERSE)—This position allows your vehicle to move backward. Always come to a complete stop before shifting into or out of R (REVERSE), except when "rocking" the vehicle as explained in the "Special Situations" section of this guide.

N (NEUTRAL)—When you place the transmission selector lever in the N (NEUTRAL) position, there is neither forward nor reverse gear engagement. The wheels are not locked. If necessary you may start your vehicle in this position.

D (DRIVE)—The normal driving position is indicated by D (DRIVE). In this position your vehicle will accelerate in first gear giving the best combination of automatic gear shifts for economical and full-power starts. As you press down on the accelerator and the vehicle picks up speed, automatic shifts to second and high gears will occur. The transmission will automatically down-shift from high as speed decreases.

CAUTION—On slippery road surfaces (wet, icy, gravel, etc.) do not downshift into 1 (FIRST) position at speeds above 20 mph (32 km/h) to avoid loss of vehicle control.

FORCED DOWNSHIFTS—At speeds from 35 to 55 mph (55 to 88 km/h) in D (DRIVE) position, you can get the power and acceleration needed to pass moving cars or climb steep grades by pushing the accelerator to the floor to downshift from high to second gear. A forced downshift from high or second to low gear is possible at speeds under 35 mph (57 km/h) or less in D (DRIVE) position by completely depressing the accelerator pedal. Remember, forced downshifts can be performed only when your vehicle is in the D (DRIVE) position. The speeds mentioned here are approximate and vary with engine size, axle ratio and tire size.

2 (SECOND)—This position limits the transmission to second gear. The 2 (SECOND) position is particularly useful when driving up moderately steep grades or for braking purposes on mountain downgrades. Use the 2 (SECOND) position for starting up when the roads are slippery. Do not exceed 55 mph (88 km/h) in this position. If you want to upshift to high gear from the 2 (SECOND) position, move the selector to the D (DRIVE) position.

1 (FIRST)—This position limits the transmission to first gear. To help brake the vehicle on hilly roads where the 2 (SECOND) position does not provide sufficient braking, shift the selector lever to 1 (FIRST). Upshifts from 1 (FIRST) can be made only by manually shifting from 1 (FIRST) to 2 (SECOND) and then from 2 (SECOND) to D (DRIVE).

Driving With Four-Speed Manual Transmission

Gear Selector Positions

The shift pattern for the standard four-speed manual transmission is shown on the gear shift lever knob.

All forward gears are synchronized. This permits you to shift while the vehicle is moving.

To operate this transmission, first make sure the gear shift lever is in the NEUTRAL position. Then, press the clutch pedal fully to the floor. Now, start the engine. Move the gear shift lever to the FIRST (low) position to go forward or REVERSE to back up.

Depress the accelerator slowly, while letting out the clutch gradually but firmly at the same time, so that the vehicle moves smoothly away. During accelerations, upshift the transmission at the speeds shown in the chart on page 121.

Engine Compartment Nomenclature

1. BRAKE MASTER CYLINDER
2. ENGINE OIL FILLER CAP & PCV FILTER (2.3L)
3. ENGINE OIL FILTER
4. FUEL FILTER (ON CARBURETOR)
5. ENGINE OIL DIPSTICK
6. DISTRIBUTOR
7. COOLANT EXPANSION BOTTLE
8. WINDSHIELD WASHER RESERVOIR
9. AIR CLEANER ASSEMBLY
10. BATTERY
11. AUTOMATIC TRANSMISSION DIPSTICK
12. POWER STEERING RESERVOIR DIPSTICK
13. PCV VALVE & GROMMET & OIL FILLER CAP
14. RADIATOR CAP (ALL EXCEPT 2.3L NON-A/C)
15. RADIATOR CAP (2.3L NON-A/C)

ROUTINE

WARNING—Never remove the radiator cap under any circumstances while the engine is operating. Failure to follow these instructions could result in serious personal injury from hot coolant or steam blow-out and/or damage to the cooling system or engine. Switch off the engine and wait until it has cooled. Even then, use extreme care when removing the cap from a hot radiator. Wrap a thick cloth around the cap and turn it slowly to the first stop. Step back while the pressure is released from the cooling system. When you are sure all the pressure has been released, press down on the cap – still with a cloth – turn and remove it.

Engine Coolant

The factory installed solution of Ford Cooling System Fluid and water will protect your vehicle to −20 degrees F (−29 degrees C) or −35 degrees F (−37 degrees C) in some northern districts of the U.S., Alaska & Canada. Since the coolant contains rust and corrosion inhibitors, you should leave it in the vehicle year around. Refer to the maintenance schedule for recommended coolant change intervals.

WARNING—Keep hands and other objects clear of the radiator fan blades! The electric cooling fan for the 2.3L turbocharged engine is mounted behind the radiator and can start to operate at any time by an increase in underhood temperature, even though the ignition switch position may be off. For this reason care should be taken to ensure that the electric cooling fan motor is completely disconnected when working under the hood.

Checking Coolant Level

Check the freezing protection rating of the coolant at least once a year, just before winter. Maintain a protection rating of at least −20 degrees F (−29 degrees C) to prevent engine damage as a result of freezing and to assure proper engine operating temperature. The rust and corrosion inhibitors tend to deteriorate with

time; follow the maintenance schedule for recommended coolant change intervals to insure proper protection.

Check the coolant level in the radiator at least once a month, only when the engine is cool.

Whenever coolant level checks are made, check condition of radiator cap rubber seal. Make sure it is clean and free of any dirt particles. Rinse off with water if necessary. When replacing on radiator, also make sure radiator filler neck seat is clean.

Whenever you do add coolant to the radiator, use equal parts of water and Ford Cooling System Fluid or equivalent. If you have to add coolant more than once a month, or if you have to add more than one quart at a time, have your dealer check the cooling system for leaks.

Plain water may be used in an emergency, but replace it with the specified coolant as quickly as possible to avoid damage to the system. With only water in the system, do not let the engine run hot.

Checking Hoses

Inspect all engine and heater system hoses for deterioration, leaks, and loose hose clamps as specified in the maintenance schedule. Repair or replace as necessary.

Engine Oil

Checking Oil Level and Adding Oil

Because it is normal to add some oil between oil changes, have your engine oil level checked each time you stop for gas. Keep the oil level within the SAFE range or above the ADD mark on the dipstick by adding oil as required. Do not overfill. For capacity see Specifications and Capacities.

2.3L (140 CID) Engine with Air Conditioning Option, 3.3L (200 CID) Engine and 4.2L (255 CID) Engine:
Your car is equipped with a crossflow type radiator and the coolant level should be maintained within 2½ to 4 inches (6.4 to 10.2 cm) below the pressure cap seat in the radiator filler neck.

2.3L (140 CID) Engine without Air Conditioning Option:
Your car is equipped with a downflow type radiator and the coolant level should be maintained within ¾ to 1½ inches (1.9 to 3.8 cm) below the pressure cap seat in the radiator filler neck.

Coolant Specification
Use only a permanent-type coolant that meets Ford Specification ESE-M97B18-C, such as Ford Cooling System Fluid. Do not use alcohol or methanol antifreeze, or mix them with the specified coolant.

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Changing Oil and Filter
You should have your vehicle's engine oil and the filter changed according to the Scheduled Maintenance Charts. Under normal driving conditions, you don't need to change more often if you use oil and filters of the recommended quality. Change your oil and filter more frequently if your vehicle operation includes extended periods of idling or low-speed operation, towing trailers, driving for a long time in cold temperatures, or driving short distances, of if used as a taxi or police car.

Your new vehicle is equipped with a Motorcraft Long-Life Oil Filter. A filter of this quality should be used throughout the life of the vehicle. It is designed to protect your engine by filtering harmful, abrasive, or sludgy particles without clogging up or blocking the flow of oil to vital engine parts.

Use a Motorcraft Long-Life Oil Filter or one of equal quality

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CLERK

No. 84-1129

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

PATRICIA CONTI AND RICHARD CONTI,
husband and wife,
Petitioners

v.

FORD MOTOR COMPANY,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals for the Third Circuit properly apply Pennsylvania law in ordering entry of Judgment N.O.V.?

2. Did the Court of Appeals for the Third Circuit err in not granting a new trial as an alternative to Judgment N.O.V. where the petitioners never raised any reason or ground for doing so?

PARTIES

The caption to the case contains the name of all parties to the proceedings in the Court of Appeals for the Third Circuit whose judgment is sought to be reviewed with the exception of Richard Conti as a third-party defendant.

In response to United States Supreme Court Rule 28.1, Ford Motor Company states that it has no parent company. Its less than wholly owned subsidiaries and affiliates are listed in the appendix.

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Other Authority:

Federal Rule of Civil Procedure 50(d) 2,4

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husband and wife,

Petitioners

v.

FORD MOTOR COMPANY,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This product liability action arises out of an incident that happened on November 11, 1980 when Patricia Conti was injured as her husband, Richard, backed up a 1984 Ford Mustang automobile while she was climbing into it. Patricia and Richard Conti filed suit against Ford Motor Company in the United States District Court for the Eastern District of Pennsylvania alleging negligent design and failure to warn. Jurisdiction was predicated on diversity of citizenship. Ford joined Richard Conti, the husband and driver, as a third-party defendant, alleging that his negligence caused the accident.

On January 7, 1983, after three days of trial, the jury in answer to special Interrogatories concluded: (1) Ford was not liable to Patricia Conti because of the design of the automobile; (2) Ford was liable to Mrs. Conti on the warning theory; (3) Richard Conti's negligence contributed to the happening of the accident by 75 percent; (4) Mrs. Conti sustained $650,000.00 in damages; (5) Mr. Conti sustained damages of $15,000.00.

After the Honorable John P. Fullam entered judgment in favor of Mrs. and Mrs. Conti and against Ford Motor Company, Ford timely filed alternative motions for judgment n.o.v. and new trial which were denied by Judge Fullam on September 26, 1983. Ford Motor Company appealed to the United States Court of Appeals for the Third Circuit. On September 17, 1984, the Third Circuit filed its opinion reversing the trial court and remanding for entry of judgment notwithstanding the verdict in favor of Ford Motor Company. The Court of Appeals denied the Contis' petition for rehearing en banc.

The Third Circuit concluded that the district court erred in submitting the issue of failure to warn to the jury since, as a matter of law, the Contis had failed to show that the absence of an adequate warning was a proximate cause of the accident.

SUMMARY OF ARGUMENT

No substantial federal or constitutional questions have been presented by petitioners. The Third Circuit exercised its proper scope of review and was within its power under Rule 50(d) when it granted judgment n.o.v. Moreover, neither the Seventh Amendment nor Rule 50(d) requires that the petitioners be granted a new trial.

REASONS FOR DENYING THE WRIT

I. THE THIRD CIRCUIT'S APPLICATION OF PENNSYLVANIA LAW AND ITS ORDER GRANTING JUDGMENT N.O.V. PRESENTS NO FEDERAL QUESTION.

The petitioners argue that this court should review this "ordinary" diversity products-liability case because it presents "an unfortunate and reoccurring [sic] propensity of the Third Circuit to manipulate the law-fact distinction. . ." which has deprived them of their Seventh Amendment guarantee of a new trial.[1] This argument is without merit. This Court has held that the Seventh Amendment does not bar an appellate court from granting a judgment n.o.v. *Neely v. Ebby Construction Co.*, 386 U.S. 317, 322 (1966). The Court of Appeals for the Third Circuit has, in this instance, carried out its designated judicial function, that of reviewing the record to see if the evidence supports the jury's finding and, if it does not, correcting the error. *Howes v. Great Lakes Press Corp.*, 679 F.2d 1023, 1029-30 (2nd Cir. 1982); *Fisher v. Valtz*, 496 F.2d 333, 349 (3rd Cir. 1974).

Although the petitioners have purportedly raised a Seventh Amendment issue, their real complaint is that the Court of Appeals was selective in its reference to the record. To support this claim, petitioners cite eight aspects of the record which the Third Circuit allegedly ignored. *None* of these examples goes to the issue of causation. Neither in the Court of Appeals nor in this Court have the plaintiffs *ever* cited any evidence that an adequate warning would or could have prevented the accident. It is precisely this lack of evidence that forced the

1. The petitioners were only able to cite one case, *Patton v. Yount*, ____ U.S. ____, 104 S. Ct. 2885 (1984), in which this Court reversed the Third Circuit for confusing the fact-law distinction. One case hardly supports the petitioners' charge of a "reoccurring [sic] propensity".

Court of Appeals to conclude that, as a matter of law, there was no evidence to support a conclusion that the absence of a warning was a cause of the accident.

II. UNDER THE CIRCUMSTANCES, THE ENTRY OF JUDGMENT N.O.V. WAS CLEARLY APPROPRIATE AND PRESENTS NOTHING FOR THIS COURT TO REVIEW.

Petitioners second argument is that the Court of Appeals should have ordered a new trial rather than Judgment N.O.V., thereby giving petitioners a second chance to prove what they failed to prove the first time.

Rule 50(d), upon which petitioners rely, provides as follows:

> If the motion for judgment notwithstanding the verdict is denied, the party who prevails on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Thus, as this Court recognized in *Neely v. Ebby*, 386 U.S. 317 (1966), Rule 50(d) preserves to the party who prevailed in the District Court the right to urge the Court of Appeals to award a new trial if that court concludes that the motion for judgment N.O.V. should have been granted.

> [I]t should not be an undue burden in the course of arguing for his verdict to indicate in his brief why he is entitled to a new trial should his judgment be set aside. Moreover, the appellee can choose for his own convenience when to make his case for a new trial:

> He may bring his grounds for new trial to the trial judge's attention when defendant first makes an n.o.v. motion, he may argue this question in his brief to the Court of Appeals, or he may in suitable situations seek rehearing from the Court of Appeals after his judgment has been reversed.

Neely v. Ebby Construction Co., 386 U.S. 317, 328-29. Petitioners never took advantage of this rule. In fact, the petition for certiorari is petitioners' first suggestion that a new trial rather than Judgment N.O.V. was the appropriate remedy.

The petitioners' charge that the Court of Appeals has foreclosed them from trying their case on the theory of the defective design of the automobile is simply ludicrous. That issue was fully litigated and decided by the jury adversely to the plaintiffs. Petitioners failed to take any exception to this finding in the trial court or in the Court of Appeals. Even in their petition for certiorari, they make no suggestion they did not have a full and fair opportunity to present all available evidence the first time.

The Court of Appeals for the Third Circuit found, as a matter of law, that it was error for the District Court to submit the warning issue to the jury and the plaintiff has failed to advance any possible grounds for a new trial, the Third Circuit properly entered judgment n.o.v.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WHITE AND WILLIAMS
Attorneys for Respondent

By: Joseph V. Pinto

JOSEPH V. PINTO
NANCY L. SIEGEL

8200P

APPENDIX

List of subsidiaries (other than wholly owned subsidiaries) and affiliates of Ford Motor Company (U.S. Sup. Ct. Rule 28.1).

The principal affiliates and subsidiaries (other than wholly owned subsidiaries) of Ford Motor Company are as follows:

Ford Motor Company of Canada, Limited
Oakville, Canada

Ford Brasil, S.A.
Sao Bernardo Do Campo, Brazil

Ford-Werke A.G.
Cologne, Germany

Ford Motor Company (Belgium) N.V.
Antwerp, Belgium

Ford Motor Company A/S
Copenhagen, Denmark

Oy Ford Ab
Helsinki, Finland

Ford Motor Company Aktiebolog
Stockholm, Sweden

Ford Nederland B.V.
Amsterdam, The Netherlands

Eveleth Taconite Company
Eveleth, Minnesota

Ford Lio Ho Motor Company LTD
Taipei, Taiwan

Fairlane Town Center (A Partnership)
Dearborn, Michigan

Renaissance Center Partnership
Dearborn, Michigan

Fairlane Woods Associates (A Partnership)
Dearborn, Michigan

In addition to the foregoing, Ford Motor Company owns varying interests in the dealers in Ford automobiles, trucks or tractors and leasing companies set forth in the following list. The list was accurate as of December, 1982 and is the most current listing available:

Banner Ford
Decatur, GA

Billy Howell Ford-Merc.
Cumming, GA

Bo Lovein Ford
Nashville, PA

Coastal Ford
Mobile, AL

Garden City Ford
Augusta, GA

George Dempsey Ford
Waycross, GA

Heritage Ford/L-M
Cookeville, TN

King's Colonial Ford
Brunswick, GA

Lynchburg Ford
Lynchburg, VA

Marshal Mize Ford
Hixson, TN

Metro Ford
Miami, FL

Miracle Ford
Gallatin, TN

Mtn. View Ford
Chattanooga, TN

Old South Ford
Lexington, NC

Perimeter Ford
Atlanta, GA

Spalding Ford/L-M
Griffin, GA

Springfield Ford/L-M
Springfield, TN

Tropical Ford
Winter Garden, FL

Two Rivers Ford
Donelson, TN

Universal Ford
Richmond, VA

Vic Bailey Ford
Spartanburg, SC

Friendly LM
Salem, VA

Ft. Walton Beach LM
Ft. Walton Beach, FL

Gateway LM
Columbus, GA

Island LM
Merritt Island, FL

Metro LM
Charlotte, NC

Nelson Ford-Mercury
Defuniak Springs, FL

Rowan LM
Winter Haven, FL

Southern LM
Decatur, GA

Wayne Blackwood LM
Rome, GA

Bob Thomas Ford
Hamden, CT

Chemung Ford
Elmira, NY

Fournier Ford
E. Providence, RI

Hammonasset Ford/L-M
Madison, CT

Metro Ford
Schenectady, NY

Millinocket Ford-Merc
Millinocket, ME

Orchard Park Ford
Orchard Park, NY

Rainbow Ford
Niagara Fall, NY

Roberts Ford
Attleboro, MA

Roger Karns Ford
Oneonta, NY

Shiretown Ford
Plymouth, MA

Stan Martin Ford
Hudson, NY

Riverside LM
Madison, TN

Springfield LM
Springfield, MA

Austin Ford
Austin, MN

Beloit Ford
Beloit, WI

Ben-Hur Ford
Sioux Falls, SD

Borchers Ford/LM
Rhinelander, WI

Capitol Ford
Madison, WI

County Ford
Jennings, MO

Court Street Ford
Kankakee, IL

Dee Harrison Ford
Monmouth, IL

Family Ford
W. Chicago, IL

Fergus Ford
Skokie, IL

Fox Valley Ford
Aurora, IL

Friendly Ford
Sioux City, IA

Haugen-Brown Ford
Farmington, MN

Heritage Ford-Merc.
Stillwater, MN

Westfield Ford
Westfield, MA

Bay State LM
Framingham, MA

Norman LM
Westbrook, ME

Olympia Fields Ford
Olympia Fields, IL

Rock River Ford
Rockford, IL

Southgate Ford
Milwaukee, WI

Sterling Ford
Sterling, IL

Suburban Ford
Elgin, IL

Superior Ford
Marquette, MI

Venus Ford
Cudahy, WI

Village Ford
Romeoville, IL

West Suburban Ford
West Des Moines, IA

Willowbrook Ford
Willowbrook, IL

Barrington LM
Barrington, IL

Bell LM
Highland Park, IL

Berens LM
Chicago, IL

Highland Park Ford
Highland Park, IL

Karp's Ford/LM
Houghton, MI

Metro Ford
Chicago, IL

Riverside LM
Montgomery, IL

Bill McCoy Ford/LM
Muncie, IN

Capitol City Ford
Indianapolis, IN

Carriage Ford
Clarksville, IN

Country Ford
Belle Vernon, PA

Crossroads Ford
Frankfort, KY

Dick Ruhl Ford
Columbus, OH

Economy Ford
Aliquippa, PA

Ernest White Ford/L-M
Delaware, OH

Fuller Ford
Cincinnati, OH

Landmark Ford
Fairfield, OH

New Castle Ford
New Castle, IN

Paducah Ford
Paducah, KY

Capitol LM
Chicago Hgts, IL

Joe Carini LM
Waukesha, WI

Leader LM
St. Louis, MO

Libertyville LM
Libertyville, IL

Park Ridge LM
Park Ridge, IL

Astley LM
Chillicothe, OH

Jim Dixon LM
Fairfield, OH

Star LM
Cincinnati, OH

Tatone LM
Fairborn, OH

Taylor LM
Cincinnati, OH

Blue Springs Ford
Blue Springs, MO

Broadway Ford
Edmond, OK

Champion Ford
Dallas, TX

Friendly Ford
Tupelo, MS

Gus Shaffar Ford
Joplin, MO

Indian Springs Ford
Kansas City, KS

Parkview Ford
Middletown, OH

Ramsey-Sturman Ford
Pittsburgh, PA

Shoemaker Ford
Springfield, OH

Washington Ford
Washington, PA

Whitewater Ford/LM
Connersville, IN

Bannister LM
Kansas City, MO

Bob Higgins, LM
Texas City, TX

North Hills LM
Hurst, TX

Robert Woodson LM
Wichita Falls, TX

Adrian Ford/LM
Adrian, MI

Al Bennett Ford
Flint, MI

All American Ford
Saginaw, MI

Allegan Ford
Allegan, MI

Alpena Ford/LM
Alpena, MI

Battle Creek Ford
Battle Creek, MI

Candy Ford-Mercury
Charlotte, MI

Interstate Ford
St. Joseph, MO

Northwest Ford
Hempstead, TX

Republic Ford
Republic, MO

Ron Roberts Ford
Wichita Falls, TX

Starkville Ford-Mercury
Starkville, MS

Stuard Ford
Ferriday, LA

Vantage Ford/L-M
El Dorado, KS

Oregon Ford
Oregon, OH

Riverside Ford
Detroit, MI

Southgate Ford
Southgate, MI

St. Johns Ford
St. Johns, MI

Tom Holzer Ford
Farmington Hills, M

Tom Sheridan Ford-Merc.
Bryan, OH

Kent LM
Kent, OH

Southside LM
Maumee, OH

Stadium LM
Youngstown, OH

Crown Ford
Warren, OH

Dick Boyd Ford
Ludington, MI

Friendly Ford
Monroe, MI

Greenville Ford/LM
Greenville, MI

Mel Farr Ford
Oak Park, MI

Montrose Ford
Akron, OH

Niles Ford/LM
Niles, MI

Empire LM
San Bernardino, CA

Miramar LM
San Diego, CA

San Gabriel LM
San Gabriel, CA

Santa Barbara LM
Santa Barbara, CA

West Covina LM
West Covina, CA

Best Ford
Queens Village, NY

Bridge Ford
Brooklyn, NY

Center City Ford
Williamsport, PA

Champion Ford
Baltimore, MD

Valley LM
Pontiac, MI

Allen Kane Ford
N. Hollywood, CA

Avalon Ford
Carson, CA

Chino Hills Ford
Chino, CA

Grants Ford/L-M
Grants, NM

Love Ford
Lompoc, CA

Mel Burns Ford
Long Beach, CA

Pacific Ford
Long Beach, CA

Covey LM
Phoenix, AZ

Kuhms-Harnish Ford
Mechanicsburg, PA

Manhattan Ford/L-M
New York, NY

Northport Ford
E. Northport, NY

Poughkeepsie Ford
Poughkeepsie, NY

Tower Ford
Baltimore, MD

Clarks Summit LM
Clarks Summit, PA

Francis Scott Key LM
Frederick, MD

Dan Buckey Ford
Spring Valley, NY

Dick Gidron Ford
Bronx, NY

Empire Ford
Mt. Vernon, NY

Family Ford
Carlisle, PA

Focaro Ford
Staten Island, NY

Freedom Ford
Wilmington, DE

Garnet Ford
Media, PA

Gateway Ford
Ozone Park, NY

Gold Star Ford
Shenandoah, PA

San Bruno Ford
San Bruno, CA

Central LM
Eugene, OR

Middlekauff LM
Salt Lake City, UT

Mission LM
Hayward, CA

Olympic LM
Seattle, WA

Shen LM
Burlingame, CA

Hassett LM
Wantagh, NY

Heritage LM
Hackensack, NJ

Northeast LM
Philadelphia, PA

Big Valley Ford
Stockton, CA

Hilltop Ford
Richmond, CA

Novato Ford
Novato, CA

New Rochelle LM
New Rochelle, NY

Arlington Ford
Arlington, WA

Heritage Ford
Modesto, CA

Kingsrow Ford/LM
Hanford, CA

Pittsburgh Ford
Pittsburg, CA